Supreme Court U.S.
FILED
MAR 19 2002
OFFICE OF THE CLERK

(8)

No. 00-10666

In The

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

JEFFREY T. GREEN
JACQUELINE GERSON COOPER
ALEXANDRA R. GELBER
ERIC A. SHUMSKY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

WILLIAM C. INGRAM
First Assistant Federal Public Defender
Counsel of Record
LOUIS C. ALLEN, III
Federal Public Defender
ELIZABETH A. FLAGG
Research & Writing Attorney
FEDERAL PUBLIC DEFENDER OFFICE
Suite 210
101 South Elm Street
Greensboro, North Carolina 27401
(336) 333-5455

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONER 1

I. RESPONDENT FAILS TO DISTINGUISH *JONES*..... 1

II. THE LEGISLATIVE HISTORY OF § 924(c) DOES NOT SUPPORT RESPONDENT'S ARGUMENTS..... 6

III. A STATUTE THAT INCREASES A MANDATORY MINIMUM IMPOSES A GREATER PUNISHMENT ON A DEFENDANT..... 8

IV. ALLOWING JUDGES TO MAKE FINDINGS THAT INCREASE A MANDATORY MINIMUM UNDERMINES THE RIGHT TO A JURY TRIAL 12

V. OVERRULING *McMILLAN* WOULD NOT HAVE DISRUPTIVE EFFECTS 14

VI. OVERRULING *McMILLAN* WOULD NOT INVALIDATE THE SENTENCING GUIDELINES 17

VII. TREATING BRANDISHING AS AN ELEMENT WILL NOT HAVE THE NEGATIVE PRACTICAL CONSEQUENCES CLAIMED BY RESPONDENT 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 16, 20

Apprendi v. New Jersey, 530 U.S. 466 (2000) 1, 16, 18

Bailey v. United States, 516 U.S. 137 (1995) 7, 8

Castillo v. United States, 530 U.S. 120 (2000) 2, 6, 7, 19, 20

Hicks v. Oklahoma, 447 U.S. 343 (1980) 11

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 6

Jones v. United States, 526 U.S. 227 (1999) ..... *passim*

Lindsey v. Washington, 301 U.S. 397 (1937) 9, 10, 11

Lynce v. Mathis, 519 U.S. 433 (1997) 10

McMillan v. Pennsylvania, 477 U.S. 79 (1986) ..... *passim*

Miller v. Florida, 482 U.S. 423 (1987) 9, 10, 11

Mullaney v. Wilbur, 421 U.S. 684 (1975) 5

United States v. Bailey, No. 1:00CR151-1 (M.D.N.C. Dec. 12, 2000) 19

United States v. Barker, 771 F.2d 1362 (9th Cir. 1985) 13

United States v. Bowser, 497 F.2d 1017 (4th Cir. 1974) 13

United States v. Brough, 243 F.3d 1078 (7th Cir.), *cert. denied*, 122 S. Ct. 203 (2001) 16

United States v. Daniels, 446 F.2d 967 (6th Cir. 1971) 13

United States v. Harris, 558 F.2d 366 (7th Cir. 1977) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Hartford, 489 F.2d 652 (5th Cir. 1974) 13

United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970) 13

United States v. Nance, 236 F.3d 820 (7th Cir. 2000), *cert. denied*, 122 S. Ct. 79 (2001) 16

United States v. Roper, 681 F.2d 1354 (11th Cir. 1982) 13

United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974) 13

United States v. Wardlaw, 576 F.2d 932 (1st Cir. 1978) 13

Weaver v. Graham, 450 U.S. 24 (1981) 2, 10, 11

Willeford v. Estelle, 637 F.2d 271 (5th Cir. Unit A Jan. 1981), *remanded from* 447 U.S. 931 (1980) 11

Williams v. Oklahoma, 358 U.S. 576 (1959) 13

Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) 13

STATUTES

18 U.S.C. § 225(a) 15

18 U.S.C. § 924(c) ..... *passim*

18 U.S.C. § 924(c)(1)(A) ..... *passim*

18 U.S.C. § 924(c)(1)(B) 19

18 U.S.C. § 924(c)(4) 2, 5

18 U.S.C. § 1111 15

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 2119 3

18 U.S.C. § 2252A 16

18 U.S.C. § 3553 18

Ala. Code § 13A-5-6(a)(4), (5) 15

Minn. Stat. Ann. § 609.11(5) 15

LEGISLATIVE HISTORY

H.R. 125, 104th Cong. (1996) 7

H.R. 920, 104th Cong. (1995) 7

H.R. 3080, 104th Cong. (1996) 7

H.R. 3085, 104th Cong. (1996) 7

H.R. 3382, 104th Cong. (1996) 7

H.R. 3454, 104th Cong. (1996) 7

H.R. 3565, 104th Cong. (1996) 7

H.R. 3698, 104th Cong. (1996) 7

H.R. 3988, 104th Cong. (1996) 7

H.R. 4181, 104th Cong. (1996) 7

S. 3, 104th Cong. (1995) 7

S. 38, 104th Cong. (1995) 7

S. 1495, 104th Cong. (1995) 7

S. 1854, 104th Cong. (1996) 7

TABLE OF AUTHORITIES – Continued

Page

SCHOLARLY AUTHORITIES

Mark Kelman et al., *Context-Dependence in Legal Decision Making, in Behavioral Law and Economics* 61 (Cass R. Sunstein ed., 2000) 11

Barbara S. Vincent & Paul J. Hofer, Fed. Judicial Ctr., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (1994) 17

OTHER AUTHORITIES

United States Sentencing Commission, *Guidelines Manual* (Nov. 2001) ..... *passim*

U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) 17

REPLY BRIEF OF PETITIONER

Nothing in Respondent's brief undermines two fundamental propositions: (1) This case is squarely governed by *Jones v. United States*, 526 U.S. 227 (1999), which interpreted a structurally identical statute to set forth elements of the relevant criminal offense; and (2) this Court's recent Fifth and Sixth Amendment jurisprudence, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), have so undercut *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) that, as a constitutional matter, any fact that triggers a mandatory minimum sentence must be treated as an element of the underlying offense. Furthermore, Respondent's protestations to the contrary, overruling *McMillan* will have only limited effects. For each of these reasons, Petitioner must prevail.

I. RESPONDENT FAILS TO DISTINGUISH *JONES*.

As demonstrated in Petitioner's opening brief, this case is governed by *Jones*. The statute here is identical in structure to that in *Jones*; the statutes' subsections provide for steeply higher penalties; the facts in the subsections are as important as those in the principal paragraph; the definition of the crime is not complete without the conclusions offered in the subsections; the acts in the subsections have traditionally been treated as elements of the offense; and the legislative history expresses Congress's intent for the acts to be elements of the offense. Pet. Br. at 8-22. In short, Petitioner's argument remains unrefuted: Pursuant to this Court's opinion in *Jones*, § 924(c)(1)(A)(ii) and (iii) set forth elements of the offense and not sentencing factors.

Respondent attempts to distinguish the two statutes on the basis of their sentence ranges. First, Respondent argues that "the pivotal considerations in *Jones* are absent here," stating that "[u]nlike the carjacking statute, the sentencing provisions in Section 924(c)(1)(A) do not raise the maximum, but only increase the minimum." Resp. Br. at 6; *see also id.* at 9-10. This was not a "pivotal" consideration in *Jones*. Indeed, it was not a consideration at all. In interpreting the statute, the *Jones* Court noted only that the subsections provided for "steeper penalties," but did not concern itself with, nor even mention, the fact that they raised the statutory maximum sentence. This is unsurprising: Whether a particular provision increases the statutory maximum or minimum sentence is irrelevant to whether the statute creates a sentencing factor or an element of the offense.

Respondent next argues that "the findings under Section 924(c) do not result in 'steeply higher penalties,' " *id.* at 12, and that the Court should therefore infer that Congress did not intend the factors to be elements of the offense. However, the Court has held that a two year increase in punishment is sufficiently burdensome to implicate liberty interests. *See Weaver v. Graham*, 450 U.S. 24, 32 n.17, 33-36 (1981). Furthermore, the minimum penalty under § 924(c)(1)(A)(iii) for discharging a firearm is heightened from five years to ten. In *Castillo v. United States*, the Court noted the significance of exactly such a five year enhancement in the minimum sentence. 530 U.S. 120, 131 (2000).

Because "*all* violations of Section 924(c) are punishable by life in prison," Respondent next argues, the increase in the mandatory minimum sentence does not "affect the 'available penalty' at all." Resp. Br. at 12. This

argument ignores reality. It is true, of course, that some defendants could receive a seven or ten year sentence without a finding of brandishing or discharging. But this is not necessarily so, nor even likely.[1] As discussed in greater detail below, a defendant who would have received a five year sentence but instead receives the increased minimum of seven or ten years surely suffers a marked change in his "available penalty." *See infra* Part III.

Respondent goes on to offer the following syllogism: The subsections in both the statute in *Jones* and the statute here appear at first glance to set forth sentencing factors (even though the Court in *Jones* went on to reject this initial impression, 526 U.S. at 233); unlike § 2119, the maximum sentence for all violations of § 924(c)(1)(A) is life in prison; therefore, the "look" of § 924(c)(1)(A) should control because the subsections do not increase the maximum sentence, but rather limit the sentencing range. Resp. Br. at 11. Respondent again attempts to draw significance from the differing sentences described in the two statutes, but there is simply no logic to the argument. While it is true that the brandishing and discharging subsections do not raise the maximum sentence available under the statute, Respondent fails to explain why this would mean that § 924(c)(1)(A) was therefore intended to set forth sentencing factors.

---

[1] The Sentencing Guidelines recommend that a defendant receive the mandatory minimum for violations of this statute. United States Sentencing Commission, *Guidelines Manual*, § 2K2.4(a)(2) (Nov. 2001). Judges may only depart upward from this recommendation if they articulate a legally permissible justification, and there would rarely be enough aggravating factors to warrant a sentence of life in prison.

Drawing on the Court's observation in *Jones* that the facts in the subparagraph of § 2119 are at least as important as those in the principal paragraph, Respondent attempts to distinguish *Jones* on the basis that "[i]n section 924(c) . . . the basic evil is addressed in the principal paragraph," and that "the acts of 'brandishing' and 'discharging' do not pose qualitatively different dangers from the underlying prohibited conduct." *Id.* at 11-12. As an initial matter, Respondent offers no support for its conclusion; this is little more than *ipse dixit*. Moreover, this position defies common sense. Certainly the brandishing or discharging of a weapon radically changes the scenario for the victim, and poses dangers that are distinct and greater than simply possessing it. Obviously Congress agreed, for it determined that those acts were sufficiently more dangerous than the simple offense that they warranted separate mention and steeper penalties.

Respondent attempts to dismiss the 225 statutes cited by Petitioner to show that brandishing and discharging have traditionally been treated as offense elements by federal and state governments. Pet. Br. at 13-14. Focusing on the federal statutes, Respondent argues that "[t]hose provisions – which use traditional offense-defining language and do not separate 'discharge' from other elements by the word 'shall' or numbered subsections – demonstrate only that Congress knows how to make discharging an offense element when it wishes." Resp. Br. at 15. This argument does not refute the fact that Congress has chosen to make discharging an offense element in these statutes. Nor does Respondent point to any statutes that treat the discharge of a firearm as a sentencing factor. Furthermore, in *Jones* the Court looked at whether the acts were traditionally treated as offense elements,

not whether those acts were found in statutes identical in structure to the statute at issue. 526 U.S. at 235-36. The Court cited numerous statutes as evidence that serious bodily injury was traditionally treated as an element of the offense, *id.*, most of which varied in structure from § 2119.

As demonstrated by *Amicus* Cato Institute, the inclusion of a specific intent element in the definition of brandishing in § 924(c)(4) further supports the conclusion that brandishing is an element of the offense, because determinations of a defendant's intent traditionally fall within the province of the jury. Br. of Cato Institute at 13; *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975). Respondent answers that an identical definition of brandishing in the Sentencing Guidelines "makes clear that Congress's use of the phrase 'in order to intimidate' does not mean that brandishing is necessarily an offense element." Resp. Br. at 16 n.5. The Sentencing Commission's inclusion of intent language in the definition of brandishing in the Sentencing Guidelines does not alter the fact that intent is traditionally an element of the offense.

While Respondent argues that the hundreds of statutes cited by Petitioner are not persuasive, it offers scant evidence to support its own position that brandishing and discharging are traditional sentencing factors, relying only on a task force report and a handful of references to the Sentencing Guidelines. Resp. Br. at 13-14. The mere mention of an act in the Guidelines, however, does not mean that the act has traditionally been treated as a sentencing factor. Indeed, in *Jones*, the Court found that "serious bodily injury" was an element of the offense, despite the fact that serious bodily injury is mentioned

repeatedly in the Sentencing Guidelines. *See* USSG § 2A2.1(b)(1)(B); USSG § 2A2.2(b)(3)(B); USSG § 2A3.1(b)(4)(B).[2]

II. THE LEGISLATIVE HISTORY OF § 924(c) DOES NOT SUPPORT RESPONDENT'S ARGUMENTS.

A review of the legislative history reveals that Congress intended brandishing and discharging to be elements of § 924(c)(1)(A). Pet. Br. at 15-22. Respondent dismisses Petitioner's analysis, claiming that "Petitioner's citations to the legislative history refer primarily to the bill initially passed by the House, which differed in critical respects from the statute ultimately passed." Resp. Br. at 17 (citation omitted). That is simply incorrect. *See* Pet. Br. at 16-22. Petitioner cites to the legislative history from two Congresses and a number of different bills, which is appropriate here, as the process of amending the statute took place over two Congresses. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277-80 & n.19 (1981) (relying on a legislative record compiled over six years).

While accusing Petitioner of not drawing broadly enough from the legislative history, Respondent offers no evidence from the legislative history that brandishing and discharging were meant to be sentencing factors. Rather, Respondent selects one of over twenty-five bills that were introduced to amend § 924(c), then compares

---

[2] Respondent also relies on a comment in *Castillo* in which brandishing was used as an example of a manner in which a crime is carried out. Resp. Br. at 13. As already discussed, *Castillo*'s reference to brandishing was dicta. *See* Pet. Br. at 14 n.6.

the structure of that one bill to the statute that was ultimately enacted. Resp. Br. at 16-17.[3] Based on this comparison, Respondent concludes that differences in the structures of the statutes proposed in those two bills mean that Congress intended brandishing and discharging to be sentencing factors. But Respondent fails to identify a single statement by a member of Congress to support this theory. Respondent's conjecture about what Congress intended cannot counter actual statements in the legislative record.[4]

Respondent also rejects Petitioner's analysis of the evolution of § 924(c) after *Bailey v. United States*, 516 U.S. 137 (1995), contending that brandishing and discharging were not elements of the offense under the prior version of § 924(c), and therefore that the amendment to the statute did not constitute a significant departure from

---

[3] Although not an exhaustive list, in addition to the bills cited in Petitioner's opening brief, Pet. Br. at 17 n.8., the 104th Congress proposed amendments to § 924(c) in H.R. 125, H.R. 920, H.R. 3080, H.R. 3085, H.R. 3382, H.R. 3454, H.R. 3565, H.R. 3698, H.R. 3988, H.R. 4181, S. 3, S. 38, S. 1495, S. 1854.

[4] Relying on an opinion from the Fifth Circuit, Respondent asserts that "statements by members of Congress referring to 'mandatory minimum sentences' do not support petitioner's reading of Section 924(c) but instead 'indicate[ ] that Congress viewed the subsections as penalty enhancements.' " Resp. Br. at 17 (alteration in original) (citation omitted). Respondent incorrectly claims that "penalty enhancement" is necessarily synonymous with "sentencing factor." The Court has rejected such arguments before. *Jones*, 526 U.S. at 237-38 ("The Government points to several statements in the 1996 amendment's legislative history in which subsection (2) is described as providing a 'penalty enhancement'. . . . [We] find the quoted statements unimpressive.") (citation omitted); *Castillo v. United States*, 530 U.S. 120, 129-30 (2000).

past practice. Resp. Br. at 18. Although it is true that the prior version of the statute referred only to "use or carry," the specific types of use, such as brandishing or discharging, were proved to a jury beyond a reasonable doubt, not established before the sentencing judge by a preponderance of the evidence. *Bailey*, 516 U.S. at 139. In practice, then, brandishing and discharging were elements of the offense. Accordingly, under Respondent's interpretation of the statute, the post-*Bailey* amendment effected a fundamental change. However, such a fundamental change should not be presumed absent an explicit expression by Congress of its intent to do so. *See Jones*, 526 U.S. at 234 ("[it is a] fair assumption that Congress is unlikely to intend any radical departure from past practice without making a point of saying so"); Pet. Br. at 15-16.

III. A STATUTE THAT INCREASES A MANDATORY MINIMUM IMPOSES A GREATER PUNISHMENT ON A DEFENDANT.

In his opening brief, Petitioner explained that increases in a mandatory minimum sentence implicate the underlying concerns of the reasonable doubt requirement because they heighten the deprivation of liberty and stigma attached to a crime. Pet. Br. at 30-34. Respondent counters that an increase in a mandatory minimum sentence does not expose a defendant to any punishment to which he was not already exposed by the jury's verdict. *See* Resp. Br. at 12, 30-31. However, the Court has recognized in the Ex Post Facto context that a statute that increases a minimum sentence imposes a greater punishment on a defendant even if it does not increase the statutory maximum to which the defendant is exposed.

In *Lindsey v. Washington*, 301 U.S. 397 (1937), the defendant was convicted of a crime that at the time of his offense carried a sentence of six months to fifteen years in prison, but that at the time of his conviction carried a mandatory sentence of fifteen years. The State argued that applying the new sentence to the defendant did not violate the Ex Post Facto Clause because he could have received fifteen years even under the old law. *See id.* at 400-01. The Court disagreed. It held that "the standard of punishment adopted by the new statute is more onerous than that of the old" and that "it is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence" less than fifteen years. *See id.* at 401-02.

The Court embraced this same logic in *Miller v. Florida*, 482 U.S. 423 (1987). There, the defendant was convicted of crimes that carried a maximum sentence of life in prison. *See id.* at 427. At the time the defendant committed the crimes, his sentencing range under the State's sentencing guidelines was three-and-one-half to four-and-one-half years in prison. Prior to his conviction, however, the guidelines were revised such that the presumptive sentencing range increased to five-and-one-half to seven years in prison. *See id.* at 424. The Court held that applying the new range to the defendant and sentencing him to seven years violated the Ex Post Facto Clause even though he could have received a higher sentence even under the old guidelines. *See id.* at 431-33. The Court explained that the Ex Post Facto Clause prohibits the government from " 'inflict[ing] a greater punishment' " on a defendant " 'than the law annexed to the crime, when committed.' " *See id.* at 429 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). Although the defendant

could have received the higher sentence even under the old range, the Court held that he was " 'substantially disadvantaged' " by the retrospective application of the new guidelines and that the punishment for his crime was made " 'more onerous' " by subjecting him to a range with a higher minimum. *See id.* at 433, 435.[5]

This case is nearly identical to *Lindsey* and *Miller*. Petitioner was convicted of a crime that carries a sentencing range of five years to life in prison, but the judge increased that range to seven years to life based on a finding that Petitioner brandished a weapon. The judge's finding did not expose Petitioner to a sentence above the statutory maximum, but his loss of liberty was nonetheless heightened. As in *Lindsey* and *Miller*, Petitioner's punishment was made "more onerous," and he was "substantial[ly] disadvantage[d]" by the judge's finding because he was "deprived of all opportunity to receive a sentence" less than seven years. *See Lindsey*, 301 U.S. at 401-02.

Although this case involves the Due Process Clause, not the Ex Post Facto Clause, the reasoning of *Lindsey* and *Miller* still applies. The question in those cases was

---

[5] *See also Lynce v. Mathis*, 519 U.S. 433, 447 (1997) (cancellation of prisoner's early release credits violated Ex Post Facto Clause because it "prolonged his imprisonment" six years, even though sentence was still within statutory range); *Weaver v. Graham*, 450 U.S. 24, 32 n.17, 33-36 (1981) (retrospective application of new formula for gain-time credits violated Ex Post Facto clause because it increased defendant's prison stay by two years, even though he was still within statutory range; "critical question . . . is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence").

whether an increase in the bottom end of a statutory range exposed a defendant to greater punishment even though the statutory maximum remained unchanged. By ruling in the affirmative, the Court recognized that a defendant faces a greater loss of liberty when the bottom end of a sentencing range is raised. Indeed, the Court in *Miller* rejected the state's claim that application of the revised guidelines did not "alter 'substantial personal rights.' " *Miller*, 482 U.S. at 430. "[T]he revised guidelines," the Court stated, "directly and adversely affect the sentence petitioner receives." *Id.* at 435; *see also Weaver*, 450 U.S. at 33 (stating that revision in formula for gain-time credits "alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment' "). Moreover, the Court has applied the same principle in due process cases. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980) (defendant was denied due process where jury was erroneously instructed that it must give forty year sentence even though jury could have given same sentence under correct instructions); *see also Willeford v. Estelle*, 637 F.2d 271, 272 (5th Cir. Unit A Jan. 1981), *remanded from* 447 U.S. 931 (1980).[6]

---

[6] *Lindsey*, *Miller*, and *Hicks* also recognize that changes in the sentencing range may affect the sentence that judges and juries choose within that range. *See also* Mark Kelman et al., *Context-Dependence in Legal Decision Making, in Behavioral Law and Economics* 61 (Cass R. Sunstein ed., 2000) (demonstrating the way in which the framing of choices influences the decisions people make).

IV. ALLOWING JUDGES TO MAKE FINDINGS THAT INCREASE A MANDATORY MINIMUM UNDERMINES THE RIGHT TO A JURY TRIAL.

Respondent next argues that allowing a judge to make findings that increase a mandatory minimum does not undermine the protections of the Sixth Amendment right to a jury trial. *See* Resp. Br. at 28-29. That right, Respondent claims, is designed to guard against over-zealous prosecutors and compliant or biased judges. But because prosecutors can demand, and judges can impose, higher sentences even without such a finding, Respondent argues that "[p]rohibiting a judge from determining a mandatory minimum sentencing factor would not" further the values protected by the Sixth Amendment. *See* Resp. Br. at 28.

This argument fails for two reasons. First, although prosecutors can request a sentence above five years for any conviction under § 924(c)(1)(A), they can only "demand" a higher sentence if they prove that the defendant brandished a weapon under subsection (ii). Prosecutors face a higher standard in proving this fact to a jury than to a judge; therefore, they gain a significant advantage when the judge is allowed to make the critical finding. Second, because the Guideline for § 924(c)(1)(A) instructs judges to impose the minimum sentence available under the statute, a biased or compliant judge also benefits when allowed to make findings that increase the mandatory minimum. *See* USSG § 2K2.4(a)(2). Without this authority, a judge can only impose a sentence above five years if the jury finds that the defendant brandished a weapon or if the judge offers a sufficient reason for departing upward. With this authority, however, the

judge can impose seven years without the jury's finding and without departing upward from the Guideline.

Respondent also argues that because a single judge – or even a group of judges – could decide to impose a minimum sentence of seven years on all defendants who brandish a weapon, there is no reason a legislature cannot make that decision for them. Resp. Br. at 24-25. But it is not clear that judges could decide *ex ante* to impose seven year sentences on any defendant who brandished a firearm without also considering mitigating factors. In *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959), the Court stated that "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." In addition, nearly every circuit court of appeals has ruled that a judge *must* exercise judicial discretion by determining the appropriate sentence based on the individual offender and not a particular offense.[7]

Even if judges could make this decision *ex ante*, there is a difference between increasing a sentence based upon judicial discretion and increasing a sentence based upon an enactment of positive law. When a legislature determines that one aspect of a crime is so important that it

---

[7] *See United States v. Wardlaw*, 576 F.2d 932, 939 (1st Cir. 1978); *United States v. Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974) (per curium); *United States v. Bowser*, 497 F.2d 1017, 1019 (4th Cir. 1974); *United States v. Hartford*, 489 F.2d 652, 655 (5th Cir. 1974); *United States v. Daniels*, 446 F.2d 967, 971 (6th Cir. 1971); *United States v. Harris*, 558 F.2d 366, 372 (7th Cir. 1977); *Woosley v. United States*, 478 F.2d 139, 143 (8th Cir. 1973); *United States v. Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985); *United States v. Roper*, 681 F.2d 1354, 1361 (11th Cir. 1982); *United States v. McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970).

warrants an increased mandatory minimum sentence in every case, the legislature has in effect created an aggravated offense. *See* Br. of Families Against Mandatory Minimums Foundation at 7-12. To then take what is an element of an aggravated offense and label it a mere "sentencing factor" undermines the defendant's right to a jury trial and due process.

V. OVERRULING *McMILLAN* WOULD NOT HAVE DISRUPTIVE EFFECTS.

Respondent argues that *stare decisis* precludes this Court from overruling *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), as such a decision would have "disruptive effects." Resp. Br. at 44. Respondent claims that overruling *McMillan* "would call into question thousands of sentences imposed under" numerous statutes that mandate minimum sentences, *id.*, violating the various legislatures' reliance interests, *id.* at 43. Likewise, *Amici Curiae* invoke a parade of horribles, arguing that numerous states have relied on *McMillan* in enacting thousands of statutes, and that such reliance argues in favor of applying *stare decisis*. Br. of Criminal Justice Legal Foundation ("CJLF") at 23 ("*Amicus* will not recount in detail the hundreds, if not thousands of mandatory minimum provisions threatened by overruling *McMillan*"); Br. of 25 States and Territories ("25 States") at 11-12 (suggesting that overruling *McMillan* will affect laws in all fifty states); *id.* at 13-15. This concern is illusory, and is unsupported by the evidence purportedly marshaled in its favor.

First, many of the statutes supposedly enacted in reliance on *McMillan* were in fact enacted *prior to McMillan*. In fact, this is so for *each* of the five state statutes identified as examples of mandatory minimums

that turn on judicially-determined gun factors. *See* Br. of 25 States at 13 (citing statutes). *See, e.g.*, Ala. Code § 13A-5-6(a)(4), (5) (enacted 1977; amended 1981); Minn. Stat. Ann. § 609.11(5) (enacted 1981). A statute passed prior to *McMillan* can hardly be said to have been enacted in reliance upon that decision.

Furthermore, although some small number of statutes would certainly be affected if *McMillan* were reversed, such a ruling would hardly have the monumental effect that Respondent and *Amici* contend. The reason is simple: Overruling *McMillan* would not affect all statutes that contain a mandatory minimum penalty. Such a ruling would not invalidate statutes that contain a traditional mandatory minimum sentence, in which Congress simply specified some minimum sentence to accompany a designated crime, *see, e.g.*, 18 U.S.C. § 1111 (mandating life imprisonment for first degree murder); 18 U.S.C. § 225(a) (mandating ten years to life imprisonment for a continuing financial crimes enterprise). Rather, such a decision would affect only those few statutes in which a judicially-determined fact triggers an increase in the mandatory minimum.

But even among the smaller category of statutes that contain such an increased mandatory minimum, few statutes would be affected. Overruling *McMillan* would not affect statutes in which the increased mandatory minimum is triggered by a fact that has been specifically designated as an offense element, or in which the triggering fact is one that has traditionally been treated as an offense element. *See, e.g., Jones*, 526 U.S. at 235-37 ("serious bodily injury" is traditionally treated as an offense element). Such statutes would pass constitutional muster precisely because the triggering fact is an element of the offense.

Furthermore, overruling *McMillan* would not render unconstitutional those statutes that do not specify whether the fact that triggers the increased mandatory minimum is an element or a sentencing factor. Most statutes fall into this category, as statutes that impose increased mandatory minimums upon the finding of an additional factor generally do not address the procedure for making that finding. *See, e.g., United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir.) ("If Congress had specified that only judges may make the findings required by § 841(b), or that these findings must be made by a preponderance of the evidence, then § 841 would create a constitutional problem. But . . . the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden."), *cert. denied*, 122 S. Ct. 203 (2001). In the face of such statutory ambiguity, and following a decision overruling *McMillan*, courts would simply apply the canon of constitutional avoidance, and interpret the triggering factor as an element. This is just what the courts have done since *Apprendi*, simply characterizing (or recharacterizing) triggering facts as elements of the underlying offense. *See, e.g., United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000) (overruling pre-*Apprendi* precedent that drug quantity is a sentencing factor under 21 U.S.C. § 841, and recharacterizing it as an element of the offense), *cert. denied*, 122 S. Ct. 79 (2001).

Finally, overruling *McMillan* would not affect the application of statutes – like 18 U.S.C. § 2252A, cited by Respondent for the contrary point, *see* Resp. Br. at 44 – in which the mandatory minimum is triggered by a provision that penalizes recidivism. *See Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998).

In short, overruling *McMillan* would affect only those few statutes in which (1) a judicially-determined fact (2) triggers an increase in the minimum sentence. Thus, although Petitioner's review of the United States Code has turned up approximately sixty federal statutes that mandate some minimum sentence – a figure in which *Amicus Curiae* CJLF concurs, *see* Br. of CJLF at 23 – the application of only a handful of those statutes would be affected by the ruling that Petitioner seeks.

VI. OVERRULING *McMILLAN* WOULD NOT INVALIDATE THE SENTENCING GUIDELINES.

Respondent argues that overturning *McMillan* would "call into question the Federal Sentencing Guidelines" because "[l]ike mandatory minimums, the Sentencing Guidelines constrain the discretion of sentencing courts in order to prevent the unfair disparities associated with indeterminate sentencing." Resp. Br. at 38. But the Sentencing Guidelines differ greatly from increased mandatory minimums, both in structure and in their operation: "[T]he guidelines take into account many more factors than do the mandatory minimums; they maintain 'sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.'" Barbara S. Vincent & Paul J. Hofer, Fed. Judicial Ctr., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 2 (1994). The Guidelines consider the base offense level, specific offense characteristics, and "certain generic adjustments . . . to further individualize the sentence." U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 21 (Aug. 1991) (footnote omitted). By contrast, increased mandatory minimums

operate upon the finding of a single factor. Furthermore, they do not allow mitigating circumstances to offset the statutory trigger. Thus, unlike the Guidelines, increased mandatory minimums do not further the goal of individualized sentencing.

In addition, the Sentencing Guidelines leave judges with considerable freedom to depart from the recommended range, and judges depart downward in more than one-third of all cases. *See* Pet. Br. at 40 n.15. Respondent argues that judges can also depart downward from mandatory minimums under the "substantial assistance" provision of 18 U.S.C. § 3553(e) or the "safety valve" provision of 18 U.S.C. § 3553(f). *See* Resp. Br. at 41. But a judge has no discretion to depart downward for substantial assistance without a request from the prosecution, *see* 18 U.S.C. § 3553(e), and safety valve departures are allowed only in drug cases and only if the defendant meets a five-part test, *see* 18 U.S.C. § 3553(f). Thus, an increase in the mandatory minimum is far more detrimental to a defendant than application of the Sentencing Guidelines because it leaves judges with much less discretion to depart downward.

VII. TREATING BRANDISHING AS AN ELEMENT WILL NOT HAVE THE NEGATIVE PRACTICAL CONSEQUENCES CLAIMED BY RESPONDENT.

Respondent argues that "a rule that requires that all facts that increase the mandatory minimum punishment be treated as elements of the offense could render indictments unwieldy and could unnecessarily complicate trials." Resp. Br. at 26. That concern has no basis. Since *Apprendi*, for example, the United States Attorney in the Middle District of North Carolina has charged brandishing and discharging in indictments under § 924(c). *See*,

e.g., *United States v. Bailey*, No. 1:00CR151-1 (M.D.N.C. Dec. 12, 2000) (defendant in a case brought under 18 U.S.C. § 924(c)(1)(A) charged in indictment with discharging firearm). This practice has not rendered indictments "unwieldy."

Nor would trials be unnecessarily complicated. The Court addressed this issue in the analogous context of machinegun cases brought under § 924(c)(1)(B):

> [T]o ask a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness. As a practical matter, in determining whether a defendant used or carried a "firearm," the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used.

Castillo, 530 U.S. at 127-28 (citation omitted). Likewise, given that juries must determine whether a defendant used or carried a firearm – an inquiry that ordinarily involves consideration of the circumstances surrounding the alleged use or carrying – there is nothing particularly complicated about juries determining whether the defendant brandished or discharged the firearm.

Along similar lines, Respondent asserts that "requiring jury determinations of facts that bear only on the applicability of mandatory minimum punishment could unnecessarily prejudice defendants. 'A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved.' " Resp. Br. at 28-29. Respondent's concern for criminal defendants is misplaced. The manifest unfairness to defendants of having brandishing proven only by a preponderance of the evidence, rather

than beyond a reasonable doubt, is far greater than any unfairness caused by the hypothetical situation posed by Respondent. *See Almendarez-Torres*, 523 U.S. 267 (Scalia, J., dissenting). In any event, as this Court has previously explained, such prejudice to defendants is likely to be minimal. *See Castillo*, 530 U.S. at 127-28.

CONCLUSION

For the reasons stated in Petitioner's opening brief and above, Petitioner respectfully requests that the decision of the Fourth Circuit Court of Appeals be reversed, Petitioner's seven year term of imprisonment be overturned, and this case be remanded to the district court for resentencing.

Respectfully submitted,

JEFFREY T. GREEN
JACQUELINE GERSON COOPER
ALEXANDRA R. GELBER
ERIC A. SHUMSKY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

WILLIAM C. INGRAM
First Assistant Federal Public Defender
Counsel of Record
LOUIS C. ALLEN, III
Federal Public Defender
ELIZABETH A. FLAGG
Research & Writing Attorney
FEDERAL PUBLIC DEFENDER OFFICE
Suite 210
101 South Elm Street
Greensboro, North Carolina 27401
(336) 333-5455

Counsel for Petitioner